

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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GUZZO, : CV-99-06612  
(SJ)

Plaintiff, :

- against -

: United States Courthouse  
Brooklyn, New York

UNITED STATES OF AMERICA, :

February 2, 2001

Defendant. : 9:30 o'clock a.m.

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STERLING JOHNSON, JR.  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

EDWARD WILFORD, ESQ.  
MARCIA G. SHEIN, ESQ.

For the Defendant:

LORETTA E. LYNCH  
United States Attorney  
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Proceedings recorded by mechanical stenography.  
Transcript produced by CAT.

D. Pereira, CRR

1 THE CLERK: United States of America vs. Guzzo.

2 THE COURT: Good morning.

3 MR. WALDEN: Judge, we didn't produce Mr. Guzzo. We  
4 did not produce him. It is our position -- and I don't want  
5 to steal the thunder from counsel -- but it is our position  
6 that this petition, unlike any merits of Mr. Lindemann, is  
7 wholly frivolous.

8 Mr. Guzzo is in a maximum security facility in  
9 Marion, Illinois, and we believe that there is always a danger  
10 with an inmate that is at Mr. Guzzo's level, in transporting  
11 him and bringing him back to this district. Because this is a  
12 2255 and he has no right to appear, we did not produce him.

13 MR. WILFORD: We don't have any objection.

14 First of all, Edward Wilford and Marcia Shein for  
15 Mr. Guzzo.

16 We don't have an objection to Mr. Guzzo not being  
17 present for purposes of arguing. We strongly differ with the  
18 government with respect to the characterization of Mr. Guzzo's  
19 petition as frivolous.

20 MR. WALDEN: I apologize. I didn't mean to steal any  
21 thunder here.

22 THE COURT: He has submitted papers; is that  
23 correct?

24 MR. WALDEN: Yes, Judge, and as have I, about six  
25 months ago.

1 MR. WILFORD: I'm sorry to say I neglected to bring  
2 my file.

3 One second, your Honor. I believe we can provide the  
4 Court with that.

5 THE COURT: I understand you've addressed the issue  
6 of the waiver but not the ineffective assistance of counsel in  
7 your papers.

8 MR. WALDEN: I haven't gone to the merits, Judge. I  
9 will explain why, because I would rather have counsel speak  
10 first because I don't want to be excused of stealing their  
11 thunder.

12 There is a reason for that. I will explain.

13 MR. WILFORD: We are still trying to locate the  
14 letter, your Honor.

15 MR. WALDEN: This is my fault, Judge. I should have  
16 brought an extra copy of papers for the court. They are  
17 looking for my February 14th letter.

18 MR. WALDEN: It was only two-and-a-half pages.

19 I can certainly explain my argument after counsel has  
20 the opportunity to present their strongest argument in favor  
21 of the petition.

22 THE COURT: Go ahead.

23 MR. WILFORD: Your Honor, the bottom line, and I want  
24 to try to frame the issue and Ms. Shein will join in with the  
25 Court's permission.

1           Basically, we present the Court with the fact that  
2 Mr. Guzzo is represented by a conflict of counsel, which in  
3 effect--

4           THE COURT: Conflict of counsel?

5           MR. WILFORD: Yes.

6           THE COURT: Who was his counsel.

7           MR. WILFORD: Mr. Ronald Rubenstein.

8           Although there was an earlier waiver of the conflict  
9 in the case, that dealt with a separate issue, your Honor. It  
10 did not deal with the death penalty issue.

11           We would present to the court that the fact that  
12 Mr. Rubenstein was conflicted and represented Mr. Guzzo at the  
13 time of the death penalty, a determination on the death  
14 penalty was being sought, that Mr. Guzzo could not waive that  
15 conflict with respect to the death penalty issue because the  
16 death penalty, as the Supreme Court of the United States has  
17 stated, death is different.

18           It would appear, your Honor, that Mr. Guzzo was never  
19 directly addressed on that issue, from the transcripts that  
20 we've provided to the court. He was never specifically asked  
21 with respect to the context of the death penalty issue whether  
22 or not he wanted to or even was seeking a waiver. We maintain  
23 it is a non-waivable conflict of counsel.

24           Beyond that, your Honor, the fact that Mr. Guzzo was  
25 indeed represented by conflicting counsel did indeed rise to

1 an ineffective assistance of counsel at a critical point in  
2 the case. Mr. Guzzo was severely prejudiced by the  
3 ineffective assistance of counsel that he received from  
4 Mr. Rubenstein, which resulted in a plea to avoid the death  
5 penalty and a current sentence of 38 years.

6 Mr. Guzzo was in a situation, your Honor, where,  
7 according to the transcripts, Mr. Walden was seeking an  
8 adjournment prior to pursuing the death penalty. He requested  
9 an adjournment of Mr. Rubenstein. Mr. Rubenstein was  
10 intransigent in his refusal to concede to the government's  
11 request for an adjournment notwithstanding the fact that the  
12 government indicated on the record in open court that the  
13 failure to agree to the adjournment would result in the  
14 government seeking the death penalty. For whatever reason,  
15 Mr. Rubenstein did not agree to the adjournment, and it did,  
16 in fact, result in the severe prejudice to Mr. Guzzo.

17 Your Honor, at this point we want to be clear with  
18 the court that Mr. Guzzo is not seeking to have his plea  
19 overturned. He is not asking to have his plea given back. He  
20 is asking to have a sentenced adjusted to reflect the  
21 appropriate sentence that he would have received had he not  
22 been represented by conflicted and ineffective counsel.  
23 Mr. Guzzo sentenced in a manner that did not afford him the  
24 treatment that the guidelines were intended to provide all  
25 defendants. Mr. Guzzo's plea resulted in an offense level of

1 54.

2 THE COURT: He got 38 years for, how many murders?

3 MR. WILFORD: They were multiple murders.

4 THE COURT: And he thinks that that's not-- he was  
5 expected to get the death penalty?

6 MR. WILFORD: That's also correct, your Honor.

7 However, I do believe that in the context of the case, had he  
8 not been represented by ineffective counsel, there were plea  
9 offers on the table which were significantly lower than 38  
10 years.

11 THE COURT: There are two things I hear you saying:  
12 Number one, there was a conflict; and number two, there was  
13 ineffective assistance of counsel.

14 MR. WILFORD: I think the two go hand in hand, your  
15 Honor. I think being represented by conflicted counsel indeed  
16 rendered the assistance of counsel that Mr. Guzzo received  
17 ineffective.

18 THE COURT: Let me hear the government.

19 MR. WALDEN: Judge, there's a couple of issues here.  
20 First of all, Mr. Wilford was talking about conflicted  
21 counsel, conflicted counsel. I've yet to hear any  
22 identification of what the alleged conflict was.

23 Their claims essentially break down in two parts,  
24 Judge. First, that counsel was ineffective for failing to  
25 take a plea offer that they claim was initiated by the

1 government. Secondly, that counsel was ineffective for -- I  
2 am doing a little bit of constructing of their own argument  
3 because it really was not clear to me -- counsel was  
4 ineffective for taking advantage of the fact that in their  
5 view the government had acted in a retaliatory way by seeking  
6 the death penalty in retaliation for his not granting an  
7 adjournment of the case.

8 I will take the issues separately, Judge. I want to  
9 say this one directly. There was no plea offer. Period. You  
10 look at their affidavits, Judge. You look at what  
11 Mr. Solotoff and Mr. Rubenstein said. They both indicate  
12 there was some level of negotiations. They are sophisticated  
13 defense counsel. They know that any plea offer made by the  
14 government is made in writing with approval of a supervisor.  
15 They cannot point to any specific promise orally, let alone a  
16 written document, that was ever offered by the government  
17 prior to the final disposition that Mr. Guzzo got.

18 They've indicated, Judge, that somehow the  
19 atmospherics of the case and the government's seeking the  
20 death penalty was in some way retaliatory and that the  
21 government pulled off this alleged plea offer. Judge, what  
22 happened is simply this. Mr. Guzzo had not one lawyer, but  
23 two. He was represented first by Mr. Rubenstein, and then,  
24 when the death penalty count was added to the indictment,  
25 Mr. Solataroff was appointed.

1           Then, after some point Gavin Scottie was also  
2 retained by Mr. Guzzo, with Mr. Guzzo's expressed hope of  
3 trying to reach a disposition in the case. Mr. Scottie didn't  
4 simply meet with me, Judge, he didn't simply meet with my  
5 supervisor. Mr. Scottie met with the United States Attorney,  
6 Zach Carter, and went through all of the details of what had  
7 lead to that point in the case, discussed the seriousness of  
8 Mr. Guzzo's charges.

9           THE COURT: Was there a point in time in which  
10 Mr. Rubenstein was relieved and Mr. Scottie came in?

11           MR. WALDEN: I don't remember the exact point at  
12 which this occurred, Judge, but there certainly was a point at  
13 which Mr. Rubenstein was relieved. I am not positive it was  
14 the exact same moment that Mr. Scottie came on.

15           There may have been three attorneys on his case for a  
16 period of time, although, I believe if there was such a time,  
17 it was a short time.

18           THE COURT: Now, when Mr. Guzzo took his plea, who  
19 was his lawyer?

20           MR. WALDEN: Mr. Scottie and Mr. Solataroff.

21           MR. WILFORD: Your Honor--

22           THE COURT: Hold on. Let me hear the government's  
23 presentation.

24           MR. WALDEN: Judge, the bottom line is that in terms  
25 of this retaliation argument, what counsel simply fails to



1 bring to the Court's attention is that there were significant  
2 developments in the case that lead the government to seek the  
3 charge for the Borelli murder, and some of the codefendants in  
4 the case began cooperating with the government.

5 The government seized some significant evidence and  
6 secured that cooperation from accomplices. That lead it to,  
7 at the point in time where it sought the charges, to seek the  
8 charges, and the charges were sought in good faith.

9 At some point, we notified the Court, as is our  
10 obligation, that we felt that we were reaching a fulcrum where  
11 there was sufficient evidence to seek additional charges for  
12 the Borelli homicide and that in fact the Borelli homicide was  
13 a death-eligible count simply because of the date on which the  
14 murder occurred.

15 But the government never sought the death penalty,  
16 never said it was going to seek the death penalty, never  
17 threatened to seek the death penalty. All we said is, Judge,  
18 is that it is a death eligible count.

19 In point of fact, Mr. Guzzo pled guilty before the  
20 Attorney General ever reached any decision one way or another  
21 about whether or not to seek the death penalty.

22 The fact that the government indicted a murder that  
23 happened to be death eligible has no bearing whatsoever on  
24 anything except potentially the defendant's own mind-set,  
25 which is, obviously, something we can't control.

1           The simple fact is there was one plea agreement  
2 negotiated and approved by the United States Attorney's Office  
3 and it was a plea agreement that both provided the defendant  
4 significant benefits, regardless of whether or not he was  
5 charged with the death penalty because his crimes carried a  
6 mandatory life sentence, and the government and the court  
7 sentenced him to the exact same agreement that he accepted.

8           In this very courtroom, the defendant was placed  
9 under oath and asked whether or not there were any threats or  
10 coercion that caused him to accept that agreement. Under  
11 oath, he indicated that there was none, that he was pleading  
12 guilty because he and his lawyer both agreed that there was no  
13 viable defense to the very, very serious charges that he  
14 faced.

15           Now, to try and get around the waiver, counsel -- and  
16 I respect counsel; that counsel has a job to do and that they  
17 are doing it -- but, Judge, this claim that there was  
18 ineffective assistance is simply frivolous.

19           THE COURT: Let me ask you. When he took this plea,  
20 his lawyer was Gavin Scottie. How does Mr. Rubenstein play  
21 into this situation?

22           MR. SHEIN: If I may. I have a little more of the  
23 sequential facts; I think it would be helpful for the court,  
24 if I may.

25           When Mr. Rubenstein was representing Mr. Guzzo, he

1 was representing him in a number of ways throughout the  
2 pretrial -- and they had multiple, multiple pretrial hearings  
3 before this court. In the process of that, there was a big  
4 argument with the government and the court about whether or  
5 not a postponement on the trial date that Mr. Rubenstein  
6 wanted to initiate of May 11th should be postponed and, if it  
7 was postponed, what the consequences of that would be.  
8 There's transcripts, and they have been submitted to the Court  
9 in our pleadings, that specifically reflect upon the series of  
10 events. There's three specific transcripts that have the most  
11 weight.

12 THE COURT: I understand that. As I understand it,  
13 Mr. Scottie was the lawyer for Mr. Guzzo when he took his  
14 plea.

15 MR. SHEIN: In the end, yes. What happened, along  
16 the way resulted in this case escalating from conversations  
17 and plea considerations of 25 years and 30 years all the way  
18 up to 38 years. The record actually does reflect upon the  
19 threats by the government as to: If you don't agree to this  
20 adjournment, we are going to supersede and we are going to do  
21 this and we are going to do that.

22 Mr. Guzzo never even sat and was able to discuss this  
23 with his lawyer in open court whether we would waive any issue  
24 of the postponement or waive Mr. Rubenstein's representations  
25 over the problem that was created that's in the record.

1 Mr. Solataroff appeared before this court and was concerned  
2 about this conflict. The court would not conflict him out but  
3 at the same time it was brought up how this situation  
4 developed. Mr. Guzzo, himself, was never asked is this going  
5 to be acceptable to proceed despite this conflict.

6 THE COURT: What about the government's claim when  
7 the Court asked have there been any threats or promises made  
8 to induce you to accept this plea?

9 MR. SHEIN: I believe Mr. Guzzo at the time that  
10 that occurred was not aware of the sequence of events that  
11 affect that process or his due process rights not to be  
12 threatened with the death penalty when he was coerced into  
13 this. It comes across very clearly. The lawyers have  
14 admitted to this type of conduct being a problem in the case  
15 and that they believed it caused the death penalty threat to  
16 be held over Mr. Guzzo. I don't think he understood the law  
17 or the facts and how that would affect him.

18 MR. WILFORD: Your Honor, most respectfully on that  
19 point, the court is asking a defendant, not a sophisticated  
20 defendant, but a defendant in a matter whether you've been  
21 threatened or not and that threat, most of the time for most  
22 people, is taken as some sort of physical threat. The threat  
23 that occurred was the overall threat of being prosecuted.

24 THE COURT: You are saying that Mr. Guzzo, who is  
25 charged with murder, is unsophisticated?

1 MR. WILFORD: In legal matters, yes.

2 THE COURT: Does Mr. Guzzo have a criminal  
3 background? Criminal category 2, wasn't he, or 3?

4 MR. WALDEN: Judge, I don't want to answer that  
5 question when I am not a hundred percent sure. As I stand  
6 here right now, it has been quite a while since I reviewed  
7 that, Judge. Needless to say --

8 THE COURT: Is your position in your papers?

9 MR. WALDEN: My position is in my papers, Judge,  
10 concerning everything but the merits, Judge. The most  
11 important part of my papers, at least in my view, was the  
12 fact, obviously, that there was a plea allocution, Judge, and  
13 he was placed under oath. Your Honor was very careful in this  
14 case to make sure that Mr. Guzzo understood the appellate  
15 waiver and Mr. Guzzo had been represented in court every  
16 single time, Judge.

17 You are obviously right that he knows what a threat  
18 was and he didn't feel threatened, Judge. He knew, at best,  
19 he faced a long, long term in prison, probably the rest of his  
20 life, and counsel was effective in securing a plea agreement  
21 that gave him specific articulable benefits, Judge, which is  
22 the difference between a life sentence and a thirty-eight-year  
23 sentence.

24 Counsel's attempt to frame this as an ineffective  
25 assistance of counsel claims, in spite of counsel's diligence

1 in this case, to me, Judge, just shows that it is frivolous  
2 and it should be dismissed.

3 MR. WILFORD: Your Honor, we have two other issues I  
4 would like to bring to the court's attention. One, I would  
5 like to respond to Mr. Wilford's last argument, but Ms. Shein  
6 has an issue I would like to place before the court.

7 Go ahead.

8 MS. SHEIN: The problem goes beyond this. It is not  
9 that simple as Mr. Walden would like to suggest. There are  
10 actual transcripts submitted to the court and affidavits that  
11 prove our position has gone unrebutted along with other  
12 questions of the conflict, whether Mr. Guzzo understood what  
13 was going on, whether he was asked to waive the conflict.

14 THE COURT: Just a second. You got a court reporter  
15 here.

16 MR. SHEIN: But there is another issue, and that is,  
17 that even under the federal Sentencing Guidelines, he was  
18 categorized incorrectly. He was categorized at level 54.  
19 There is no such level. He received acceptance of  
20 responsibility credit, which he would never have benefited  
21 from under some merging law that was available. Then the 43  
22 is the cap under chapter 5 and any benefit must come from  
23 that. If you do that calculation, his guidelines would have  
24 been in the 25-to-30-year range. He was sentenced outside the  
25 guidelines in respect to how the presentence report ended up

1 evaluating the case.

2 Even that may reinforce the problem that Mr. Walden,  
3 at the time when they were discussing these plea negotiations,  
4 whether it was in writing or not, was within the range that  
5 was available. There are bigger issues than certainly what  
6 Mr. Walden suggests is frivolous.

7 They are in the pleadings.

8 MR. WALDEN: That is my point. Her argument  
9 completely misses the point. He was charged under  
10 1959(A)(1). That is mandatory life. It doesn't matter what  
11 the guidelines were. If he was convicted of the Borelli  
12 homicide, your Honor would have had no discretion but to give  
13 him a life sentence. Counsel, faced with that significant  
14 possibility, secured for him a plea that gave him the  
15 possibility of being released from prison after approximately  
16 32 or 33 years. So to phrase that now in retrospect as  
17 ineffective and then --

18 THE COURT: Let me hear you, counsel.

19 MR. WILFORD: Your Honor, I want to just respond to a  
20 couple of comments that Mr. Walden made. He has alluded to it  
21 again in his most recent comments.

22 The death penalty, your Honor, is not something that  
23 we can just talk about. It is a very serious, serious,  
24 serious consideration. You can't say that when a defendant is  
25 facing a count that's death eligible he is just facing a

1 count. It is a distinct difference in the case. It presents  
2 a distinct issue in the case. The defendant is then entitled  
3 to different learned counsel. There are a whole sequence of  
4 events that --

5 THE COURT: Learned counsel was appointed.

6 MR. WILFORD: I am saying, there are a whole  
7 different sequence of events that occur. And the thrust of  
8 Mr. Walden's argument is that, well, you know we never really  
9 threatened him with the death penalty; it was just out there.  
10 That fact, your Honor, belies what actually happened.

11 In this instance, your Honor, the effective  
12 assistance of counsel that Mr. Walden's alluding to that  
13 occurred at a later date does not obviate the ineffective  
14 assistance Mr. Guzzo received which placed him in a position  
15 at a time when he was in fact facing a death-eligible count  
16 that he did receive effective counsel. It doesn't change what  
17 happened before. I think when Mr. Walden talked about  
18 Mr. Guzzo's attorney negotiating effectively, indeed he may  
19 have, given the circumstances in which he found himself in.

20 But to have been placed in those circumstances by  
21 ineffective representation, your Honor, needs 404(b) to be  
22 addressed. I want to just stress to the Court we are not  
23 asking the Court, as I started to say before, we are not  
24 asking the court to withdraw Mr. Guzzo's plea. We are asking  
25 the Court to do what Mr. Shein indicated, to treat



1 Mr. Guzzo --

2 THE COURT: That undercuts your argument. You are  
3 saying counsel was ineffective but you still want to take the  
4 plea but you want a lesser sentence.

5 MR. WALDEN: He was saying there is a remedy to the  
6 court, there is a remedy the court he can apply that would  
7 satisfy this ineffective assistance of counsel without going  
8 all the way to the level of giving him his plea back. There  
9 is an effective remedy.

10 MR. WILFORD: The remedy that we are proposing to the  
11 Court is simply that the Court look at what Ms. Shein has  
12 indicated, that at a level 43, which is the maximum, and Mr.  
13 Walden alluded that he would be facing a life sentence, that's  
14 not the plea.

15 The plea was to a situation where he is facing a  
16 guideline level of 54. If you bring it to 43, give him three  
17 points for acceptance of responsibility, it comes down to  
18 level 40. At level 40, you are talking about, I believe in  
19 the range of 25 to 38 years. That's what we are talking about  
20 here. We are not saying give Mr. Guzzo his plea back, we want  
21 to go to trial. What we are asking the court to do is --

22 THE COURT: I am going to decide this on the merits.  
23 That's it.

24 I think you should take into consideration, I heard  
25 the government say that in some cases, one day, when arguments

1 like this come before the court, they are going to agree to  
2 let the defendant withdraw his plea and he is now going to be  
3 exposed to the ultimate.

4 Is that what you want?

5 MR. WILFORD: Your Honor, that's why I proposed a  
6 remedy to the court which did not involve a withdrawal of  
7 Mr. Guzzo's plea.

8 MR. WALDEN: There is one thing that I have to say  
9 for the record, and if the Department of Justice gets a copy  
10 of this transcript -- and I am saying something that I am not  
11 supposed to be authorized to say; I am unaware of it so I am  
12 I'm sorry. But there is one thing that counsel knows as they  
13 are standing here, and the fact that they are not saying it,  
14 Judge, I believe is extremely significant.

15 I believe that when Mr. Gavin and Mr. Solataroff met  
16 with the United States Attorney, the United States Attorney  
17 made it clear what his position was on the death penalty, what  
18 the recommendation was going to be on the death penalty. It  
19 is -- let me say it is not consistent with the argument that  
20 they are making, that as Mr. Guzzo was standing here in front  
21 of the Court he believed that the government was gunning for  
22 him and was going to seek the death penalty.

23 Judge, I want to make sure that I go back and speak  
24 to my supervisors before. If this came to a hearing, it would  
25 obviously have to be a full hearing. Mr. Scottie would have

1 to be here. He would have to talk about the conversation he  
2 had with the United States Attorney. Obviously, there's very  
3 significant consequences. Judge, there is a procedure here,  
4 and the procedure belies the argument that the court has the  
5 authority that they claim the court has. This is a 2255  
6 petition. They are asking you to vacate his sentence. If  
7 your Honor grants that petition --

8 THE COURT: That's what I said.

9 MR. WALDEN: I'm sorry, if I am saying it, Judge, I  
10 want it to be clear to counsel. We are now at the stage of  
11 prior to sentencing and both parties have the right to  
12 withdraw the plea. I am not saying at all that the government  
13 would do or not do anything, Judge. It is irrelevant what  
14 penalty he would seek.

15 But your Honor is right, that all of this is just  
16 simply an end run and there was a fair plea that the defendant  
17 entered into knowingly, and this is just an attempt to get a  
18 lower sentence. That's all this is, Judge.

19 MR. WILFORD: Just one point.

20 THE COURT: That's what counsel said. They didn't  
21 want to withdraw the plea; they just want a lower sentence.

22 Just a second. Are there any more submissions that  
23 you would like to add to what you've already added?

24 MR. WALDEN: Not at this time, Judge. If the court  
25 has additional concerns about any other issues or more issues

1 are raised, we are happy to brief whatever the court would  
2 like us to. Those papers essentially layout what I've just  
3 said, Judge.

4 THE COURT: Do you want anymore submissions?

5 MR. WILFORD: Your Honor, yes. Can we have two weeks  
6 to put something in?

7 THE COURT: What are you going to put together?

8 MR. SHEIN: Let me ask before you continue that  
9 thought.

10 We have submitted the original petition, a plea  
11 petition, supplemental documents, including affidavits, plus  
12 the transcripts that are applicable. We have supplied to the  
13 court actually the summary of all that in the last submission  
14 that I thought the court would have available to it this  
15 morning. I want to make sure you do have that because it  
16 reflects specifically these transcripts we want the court to  
17 review talking specifically to Mr. Walden's statements  
18 concerning if this adjournment was not agreed to that it would  
19 be pursued in a superseder. In fact, it is repeated in those  
20 three transcripts.

21 MR. WALDEN: Do you want to give me the dates and the  
22 pages?

23 MR. SHEIN: February 4th is the first one, of '98.  
24 This is not page specific. Initial conversation about the  
25 postponement. The actual one that is of consequence to you is

1 February 18, page 7. And then there is another one subsequent  
2 to that, which is July 2, and that would be Mr. Rubenstein's  
3 commentary on the same issue on page 6. This is the conflict  
4 transcript where Mr. Rubenstein specifically brings up the  
5 concerns he has and no one ever speaks to Mr. Guzzo about  
6 that.

7 MR. WILFORD: Your Honor, the only reason I was  
8 requesting two weeks, I wanted to have an opportunity to look  
9 at the transcript from today's proceedings.

10 THE COURT: We'll get an adjourned date. If you want  
11 to submit something thereafter, you just let me know. I heard  
12 you loud and clear. You got a 2255 for the purpose of getting  
13 a lower sentence. Okay.

14 MR. SHEIN: Guideline sentence, Judge. It should  
15 have been a guideline sentence in the beginning.

16 MR. WILFORD: Appropriate sentence.

17 One final point. Mr. Walden's statement I don't  
18 think he was talking out of school. I understand he is a very  
19 passionate prosecutor and he was indicating that the position  
20 of this particular United States Attorney may not have been to  
21 seek the death penalty and that it may have been conveyed to  
22 Mr. Scottie. I don't know that for a fact.

23 But I do know, however, your Honor that in several  
24 instances in this district and in the Southern District,  
25 notwithstanding the recommendation and the position of the

1 United States Attorneys in those two districts, that  
2 Washington has in fact decided --

3 THE COURT: I understand the protocol. It goes to a  
4 committee in the Eastern District, then to the United States  
5 Attorney, then a committee in Washington, in which death  
6 penalty counsel have a right to put their position forth in  
7 Washington, and then ultimately to the Attorney General.

8 MR. WILFORD: Whose decision can be --

9 THE COURT: The ultimate decision is the Attorney  
10 General's. If everybody else says no, the A.G. can say yes.

11 But, also, I heard Mr. Walden say that in the  
12 protocol in which there is a committee in the Eastern District  
13 in which the death penalty counsel does not have the right to  
14 present his case to the United States Attorney, in this  
15 instance the United States Attorney saw Mr. Scottie, who  
16 represented Mr. Guzzo.

17 MR. WILFORD: That is correct, your Honor.

18 MR. WALDEN: And Mr. Solataroff, Judge.

19 THE COURT: And Mr. Scottie.

20 MR. SHEIN: All of that after the fact of what  
21 happened. That's what we are leading up to.

22 MR. WALDEN: No, Judge, that was not after the fact.  
23 That was before the final plea number was negotiated. That  
24 meeting was for the purpose of addressing not only the death  
25 penalty concerns, but I mean specifically negotiating a plea.

1 The negotiations occurred between Mr. Scottie and Mr.  
2 Solataroff with the United States Attorney, with me present,  
3 and it was as a result of a series of conversations that the  
4 38 number was arrived.

5 MR. SHEIN: I am not disagreeing with that. I don't  
6 know want to mislead. I am telling the court there's a series  
7 of events that occurred before they got his case.

8 THE COURT: Slow down. You have no case at all  
9 without a record.

10 MR. SHEIN: The series of events that lead up to  
11 what Mr. Walden is referring to is indeed those things -- he  
12 is not misleading the court.

13 I am just saying there was a series of things before  
14 Mr. Scottie and Mr. Solataroff got the case that created a  
15 scenario for Mr. Scottie and Mr. Solataroff to be limited in  
16 what they could do at that point. Indeed, that is what caused  
17 Mr. Guzzo the problem.

18 I also would like to add, just for the court's  
19 concern, that Mr. Guzzo, yes, he was facing life, but once  
20 there was a plea negotiation on the table, that was no longer  
21 true, and that then results in a guideline sentencing problem  
22 that has to be done straight up by the guidelines. If they  
23 are not, then they are getting outside the guidelines, trying  
24 to go for a heartland decision above them, and there would be  
25 departure issues. There has to be a question here that must

1 be addressed concerning that.

2 THE COURT: He was exposed to a mandatory life  
3 count. What's above that?

4 MS. SHEIN: When they drop out or getaway from a  
5 mandatory portion, the guidelines take effect.

6 MR. WALDEN: Can I just ask the court to clarify one  
7 thing with counsel so there is no misunderstanding about this  
8 on the record, because they said I was accurate about  
9 everything but not this specifically, and I think this is  
10 important for the court to ask them directly.

11 At the time Mr. Guzzo took the plea, did his counsel  
12 communicate to him that it was their understanding that the  
13 United States Attorney in this district was going to recommend  
14 against the death penalty?

15 MR. WILFORD: I'm sorry, Mr. Walden. Could you  
16 just --

17 MR. WALDEN: I am asking the court to ask you a  
18 question. I am not addressing you directly.

19 THE COURT: Yes. Did you hear the question?

20 MR. WILFORD: I didn't hear the question but I heard  
21 the question. I would most respectfully say to the court  
22 that's a matter that I am not in a position to testify. I was  
23 not at that meeting. That's not contained in any affidavit we  
24 obtained from Mr. Guzzo. If that is something that the court  
25 wishes to explore, the problem with --



1 THE COURT: I wish to explore that. Find out from  
2 your client.

3 MR. WALDEN: Judge, they filed these papers claiming  
4 that the defendant was under the threat. They used this word  
5 in their papers.

6 Are they saying that they've never asked their client  
7 whether or not counsel communicated to them that it was  
8 counsel's belief that the United States Attorney was not going  
9 to recommend for the death penalty?

10 THE COURT: Is that your position?

11 MR. WILFORD: No. Your Honor, I am not taking a  
12 position on that question.

13 As I started to say to the court, the conversation  
14 that occurred, I was not privy to. There has been no  
15 affidavit from Mr. Scottie indicating anything about that  
16 conversation.

17 THE COURT: What about your client?

18 MR. WILFORD: I haven't discussed it with my client  
19 in terms of whether or not there was any representation by  
20 Mr. Scottie as to the United States Attorney's position.

21 THE COURT: I spent enough time on this.

22 Let's get an adjournment. A month. You are going to  
23 submit additional papers.

24 MR. WILFORD: I may submit additional papers. As I  
25 said, I wanted to look at the transcript to make sure there is

1 nothing we touched on today that hasn't been addressed by  
2 submissions.

3 THE COURT: I am going to give you two weeks to  
4 submit papers.

5 If you have something further to submit, we'll  
6 adjourn it a month thereafter.

7 THE CLERK: March 16.

8 THE COURT: If they submit papers, do you want --

9 MR. WALDEN: Here is my problem. I am starting a  
10 complex trial in front of Judge Korman on the 26th. I don't  
11 want to adjourn this. I want this dealt with as quickly as I  
12 can possibly do, given my other responsibilities, Judge.

13 May I receive counsel's papers, read them as quickly  
14 as possible, and then notify the court in writing if I wish to  
15 submit something else and request a particular date.

16 THE COURT: Okay.

17 MR. WILFORD: That's fine.

18 Considering Mr. Walden's schedule, I am very busy  
19 myself, involved in the embassy bombing trial. I understand  
20 it there are time considerations. If there is nothing to  
21 write or submit additional papers on, I will notify the court  
22 and Mr. Walden by a letter by the middle of next week.

23 THE COURT: Okay.

24 MR. SHEIN: Very good.

25 MR. WALDEN: We can write the court and suggest a

1 couple of days and your Honor can tell us what date you would  
2 like us to come back.

3 THE COURT: Let's give a date now.

4 THE CLERK: The papers February 16th, two weeks, and  
5 March 16th for the next conference.

6 MR. WILFORD: Thank you for your time and  
7 consideration.

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